Supreme Court, U. S.
FILED
DEC 23 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-9021

JAMES MITCHELL and ARTIE MITCHELL,
Petitioners,

v.

RICHARD D. HONGISTO, Sheriff, City and County of San Francisco,
Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.

JAMES MITCHELL and ARTIE MITCHELL,
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RICHARD D. HONGISTO, Sheriff, City and County of San Francisco,
Respondent.

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on August 21, 1975.

OPINIONS BELOW

Petitioners James and Artie Mitchell were convicted March 2, 1971 of violating California Penal Code § 311.2 (exhibition of obscene matter), and were sen-

tenced to six months and four months, respectively, and each fined One Thousand Dollars. Both petitioners filed timely notices of appeal and on February 1, 1972, the Appellate Department of the Superior Court for the City and County of San Francisco affirmed the judgment. A Petition for Re-Hearing or Alternatively for Certification to the Court of Appeals was denied on February 15, 1972. A Petition for Writ of Habeas Corpus to the Court of Appeals was denied April 7, 1972, and on May 4, 1972, by a 4 to 3 vote the California Supreme Court denied a Petition for Hearing on Habeas Corpus. No opinion was filed by any of these state courts.

On October 25, 1972, this Petition for a Writ of Habeas Corpus was filed in the United States District Court for the Northern District of California. The Petition was summarily dismissed on November 7, 1972. In this same order, it was certified that probable cause for appeal existed (Appendix, page 1). Appeal was taken to the United States Court of Appeals for the Ninth Circuit and on July 17, 1973, Circuit Judges Chambers and Wallace remanded the case to the District Court on stipulation of the parties.

On January 9, 1974 the District Court denied the petition herein (Appendix, page 2). An appeal to the United States Court of Appeals for the Ninth Circuit followed. That court affirmed the Order of the lower court on August 21, 1975 (Appendix, page 14).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on August 21, 1975 and a copy thereof is appended at page 14. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

At the jury trial in the Municipal Court, the only evidence introduced by the prosecution was the film "Glowy Flesh" which was the basis of the criminal charge, and the testimony of one Sgt. Sol Weiner, an officer of the San Francisco Police Department. The Court of Appeals for the Ninth Circuit affirmed the order denying petitioners' writ of habeas corpus solely on the authority of *Hicks* v. *Miranda*, 95 S. Ct. 2281 (1975). The questions presented are therefore:

(1) Whether California Penal Code Section 311.2 as written or construed meets the constitutional requirements of specificity set forth in *Miller* v. *California*, 413 U.S. 15 (1973).

(2) Whether, if the *Miller* test is not applied to a conviction in 1971, Appellants were convicted in violation of the due process clause of the Fourteenth Amendment in that there was no evidence to establish the essential elements of obscenity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

FOURTEENTH AMENDENT, SECTION 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizen of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Penal Code

SECTION 311.2:

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State possesses, prepares, publishes or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is quilty of a misdemeanor."

SECTION 311:

As used in this Chapter:
"(a) 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters."

SECTION 312.1:

"In any prosecution for violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter which is the subject of any such prosecution. Any evidence which tends to establish contemporary community standards of appeal to prurient interest or of customary limits of candor in the description or representation of nudity, sex or excretion, or which bears upon the question of redeeming social importance, shall, subject to the provisions of the Evidence Code, be admissible when offered by either the prosecution or by the defense."

STATEMENT OF THE CASE

Petitioners James Mitchell and Artie Mitchell were convicted in the Municipal Court of San Francisco, California, for violating Section 311.2 of the Penal Code in that they exhibited obscene matter. At the jury trial in the Municipal Court, the only evidence introduced by the prosecution was the film, which was the basis of the criminal charge, and the testimony of one Sgt. Sol Wenier, an officer of the San Francisco Police Department.

In the United States District Court, Judge Zirpoli adopted as his own the conclusions of the California Court of Appeal in *People* v. *Enskat*, 33 Ca. App. 3d 900, 109 Cal Rptr. 433 (1973), *hearing denied* by the California Supreme Court October 24, 1973, which held that Penal Code Section 311.2 as construed met the constitutional standards set forth in *Miller* v. *California*, 413 U.S. 15 (1973). Judge Zirpoli noted that while *Miller* vacated a conviction under Penal Code § 311.2 it did not declare that statute unconstitutional (Appendix, page 9).

The opinion of the Ninth Circuit in this case was based solely on the case of *Hicks* v. *Miranda*, 95 S.Ct. 2281 (1975).

REASONS FOR GRANTING CERTIORARI

A. Penal Code § 311.2 Is Unconstitutionally Vague and Overbroad Under the Miller Standards.

Petitioners are cognizant of *Miller* v. *California*, 418 U.S. 915 (1974) *(Miller II)* and of *Hicks* v. *Miranda*, 95 S.Ct. 2281 (1975) but believe that these cases do not represent a firm ruling on the constitutional sufficiency of the California obscenity statute. Petitioners are, in

any event, constrained by the inevitable logic of the District Court opinion in *Miranda* v. *Hicks,* Civil Number 73-2775-F to argue the unconstitutionality of California's statute under the *Miller* standards. In this connection, it is interesting to note that the California Supreme Court, in *Noel C. Bloom* v. *Municipal Court for the Inglewood Judicial District of Los Angeles,* No. L.A. 30258, requested that the parties submit briefs on the constitutionality of Penal Code § 311.2 in the light of *Miller.* Arguments were heard on June 12, 1974, but no decision has yet been reached.

The *Miranda* Court pointed out that under *Miller,* a state obscenity statute must meet three tests:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

(2) whether the work depicts or describes, in a patently offensive way, sexual conduct, *specifically defined by the applicable state law,* and

(3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

As in *Miranda, supra,* the issue presented here is whether the statute as written or construed specifically defines proscribed sexual conduct.

On its face, neither Section 311.2 nor Section 311, which defines "obscenity," meets this test of specificity. But Judge Zirpoli and the *Enskat* Court concluded that this facial deficiency of the statute has been cured by judicial construction. Four cases have been cited for this proposition: *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 31 Cal. Rptr. 800 (1968); *People* v. *Noroff,* 67 Cal. 2d 791, 63 Cal. Rptr. 575 (1967); *People* v. *Cimber,* 271

Cal. App. 2d Supp. 867, 67 Cal. Rptr. 382 (1969); and *Landau* v. *Fording,* 245 Cal. App. 2d 820, 54 Cal. Rptr. 177 (1966). A review of these cases will show that they do not meet the Miller requirement of specificity.

In *Zeitlin* v. *Arnebergh, supra,* Justice Tobriner of the California Supreme Court states, ". . . boundary lines for the forbidden pale of obscenity must delimit only the area of hardcore pornography." *Id.* 31 Cal. Rptr. at 810. But the term "hardcore pornography" is no more precise than the term "obscenity". *Jacobellis* v. *Ohio,* 378 U.S. 184 at 201 (1964).

People v. *Noroff, supra,* is a decision of the Appellate Department of the Superior Court for Los Angeles County. In reversing a dismissal of a prosecution under Penal Code Section 311.2, the Court states that to be culpable, the matter involved must contain "a graphic description of sexual activity." 76 Cal. Rptr. at 383. There is no further description or specific definition of the sexual conduct that may not be so described.

Landau v. *Fording, supra,* was a civilian action for declaratory relief brought by a motion picture exhibitor against the Chief of Police of Berkeley, California. The trial court found that the film "Un Chant d'Amour", by Jean Genet, was obscene within the meaning of Penal Code Section 311. In affirming this judgment, the California Court of Appeals in no way restricted or confined the application of Section 311 to descriptions of specifically defined sexual conduct.

It cannot be fairly said from the above that the California State Courts have cured, by judicial construction, the glaring facial deficiency of the California obscenity statute. In *Miller* v. *California, supra,* the United States Supreme Court stated "we now confine

the permissible scope of such regulation to words which depict or describe such sexual conduct. That *conduct must be specifically defined by the applicable state law* . . . ." 413 U.S. at 24 (emphasis added). Here for the first time, the Court adopted a Fifth Amendment fair notice rule consonant with the long established rule of due process that no person may be subject to criminal prosecution without "fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harris,* 347 U.S. 612, 617 (1954).

Thus is it clear that Penal Code Section 311.2 both as it is written and as it has been construed, fails to meet the First and Fifth Amendment standards set forth by the United States Supreme Court, so that any conviction under the statute is unconstitutional, and relief by way of the writ of habeas corpus is the appropriate remedy here.

B. Under the Standards Previous to the Miller Line of Decisions, No Evidence Was Presented as to Two Essential Elements of Crime.

It is clear that *Miller* v. *California, supra,* and companian cases, do not have retroactive effect and an offense committed before those cases is entitled to be tried under the legal standards extant at the time of the offense. *Hamling* v. *United States,* 418 U.S. 87 (1974). Since these cases are not to be given retroactive effect, Appellants' claims below that no evidence was presented on two elements of the crime must stand. Therefore, this Court should grant this writ in order to allow a full briefing and oral argument of petitioners' contention that no evidence as to essential elements of the crime charged was presented.

California Penal Code Section 311 has three requirements for finding any matter obscene:

(1) the predominant appeal of the matter, to the average person applying contemporary standards, is to prurient interests;

(2) taken as a whole the matter goes substantially beyond customary limits of candor in description or representation of such matters; and

(3) the matter is utterly without redeeming social value.

These requirements are independent, and each must be proven before a finding of obscenity may be made. *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1965); *accord, In re Giannini,* 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).

In order to prove these elements, evidence on each must be presented, yet at trial the only evidence submitted by the prosecution was the film itself, and the testimony of Sgt. Weiner of the San Francisco Police Department. The film itself obviously is not evidence of either contemporary standards, customary limits of candor, or redeeming social value, all of which are extrinsic standards.

In refuting this argument, Judge Zirpoli relied on *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56, which holds that the film itself is sufficient evidence of obscenity without affirmative expert testimony. But this was not the law in 1971. Judge Zirpoli states (App. 6) that Penal Code Section 312.1, eliminates are requirement for expert testimony in California, and effectively reverses *In re Giannini,* 69 Cal. 2d 563, 446 P. 2d 535, 72 Cal. Rptr. 655 (1968). No case in California has

been reported testing the constitutionality of Penal Code Section 312.1, and it may certainly be argued that it is not within the legislature's power to overturn the California Supreme Court's statement that:

> "Relying principally on the well established doctrine that jurors should not be endowed with the prerogative of imposing their own personal standards as a test of criminality of conduct, we hold that expert testimony should be introduced to establish community standards. *Id.* 69 Cal. 2d 563, 72 Cal. Rptr. 655, 663.

Judge Zirpoli stated that the jury, in his opinion had ample opportunity to evaluate the testimony of Sgt. Sol Weiner because during voir dire of the witness' qualifications, defense counsel elicited an admission that he believed the customary limits of candor regarding sexual activities have remained essentially the same in California since 1928 (Appendix, page 11). Such a singular statement would undoubtedly affect a reasonable juror's evaluation of the witness' testimony, and would, in effect, leave the jury with no evidence at all of contemporary standards.

Judge Zirpoli states that even if Sgt. Weiner's testimony should not have been admitted, the subsequent instructions to the jury cured any prejudice to appellants that would constitute a constitutional violation (Appendix, page 11).

But *Parks* v. *United States,* 394 A.2d 858, (D.C. Ct. App. 1972), held that where the Government's prima facie case (introduction of the film alone) is refuted by defense testimony that the three elements of obscenity are not present, the Government is required to introduce countervailing testimony as to each element.

It must be remembered that the United States Supreme Court's ruling in *Paris Adult Theatre I* v. *Slaton, supra* a civil case) that expert testimony is not required to prove obscenity, was made in the context of the decision in *Miller* v. *California,* 413 U.S. 15 (1973). In *Miller,* the Court rejected the "utterly without redeeming social value" tests of *Memoirs* v. *Massachussetts,* 383 U.S. 413 (1965), and formulated new rules for testing obscenity, because the *Memoirs* test was "unworkable". The reasoning which prompted the Court in *Slaton* to reject the necessity of expert witnesses is predicated upon the clarified standards of obscenity found in *Miller,* and should not be cited as applying to any case tried under the earlier *Memoirs* test.

Whatever the Federal standards of obscenity are, it must be remembered that in California the "community" by whose standards obscenity is to be tested, is the entire State of California. *In re Giannini,* 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655, 663 (1968). It is simply not realistic to state that the average juror has knowledge of what the contemporary community standards of the entire State of California is, without presenting him with evidence of that standard.

> An even-handed application of the criminal law, even with evidentiary guidance, is sufficiently difficult in an area so confusing and intricate as obscenity. To sanction convictions without expert evidence of community standards encourages the jury to condemn as obscene such conduct or material as is personally distasteful or offensive to the particular juror.
>
> *Id.* 72 Cal. Rptr. 655,663.

Sgt. Weiner, the prosecution's only witness, testified that he believed the standards of candor in California

were set long before he was born in 1928, and have remained virtually unchanged ever since. Further, Sgt. Weiner testified that, in his opinion, it is unnecessary for matter to be "taken as a whole" or that it go "substantially" beyond customary limits of candor for it to be found obscene. Even if "expert" testimony is not required under constitutional standards existing prior to *Paris Adult Theatre I* v. *Slaton, supra,* the admission of Sgt. Weiner's evidence, so clearly at variance with the standard of *Memoir, supra,* and the language of Penal Code Section 311 itself, is so prejudicial as to constitute a violation of the Constitution.

CONCLUSION

For the above reasons, Petitioners pray this Court grant this Petition and issue its Writ of Certiorari to allow a full briefing and oral argument of the points raised herein.

Respectfully submitted,

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December 19, 1975

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-72-1931-AJZ

JAMES MITCHELL and ARTIE MITCHELL, *Petitioners,*

v.

RICHARD D. HONGISTO, Sheriff, City and County of San Francisco, *Respondent.*

Order of Summary Dismissal and Certificate of Probable Cause

[Filed Nov. 8, 1972]

Petitioners JAMES MITCHELL and ARTIE MITCHELL, having appeared before this Court through counsel on this 31st day of October, 1972, seeking an order to show cause upon their *ex parte* application therefor,

IT IS HEREBY ORDERED that said order to show cause is denied and the petition for writ of habeas corpus dismissed, pursuant to *Choung* v. *Misterly,* 456 F.2d 176 (9th Cir. 1972) cert. pet. filed 11 Crim. L. 4105.

Pursuant to 28 U.S.C. Section 2253 I hereby certify that probable cause exists for an appeal.

Dated: Nov. 7, 1972.

/s/ ILLEGIBLE
Judge of the United States District Court

[Caption omitted in printing]

No. C-72-1931 AJZ

PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Order Denying Petition for Writ of Habeas Corpus

[Filed Jan. 9, 1974]

Petitioners, James and Artie Mitchell, were convicted of violating section 311.2 of the California Penal Code[1] by exhibiting an allegedly obscene motion picture film, entitled "Glowy Flesh." They were sentenced to serve six months and four months, respectively, in the county jail, and pay a fine of $1,000 each. Their convictions were affirmed on appeal to the Appellate Department of the Superior Court. Petitioners were denied a writ of habeas corpus in the Court of Appeal and the Supreme Court of California. This court originally dismissed the petition for writ of habeas corpus filed here pursuant to *Choung* v. *Misterly,* 456 F.2d 176 (9th Cir. 1972). An appeal was taken, and pursuant to a stipulation between the parties, the case was remanded to this court. An order to show cause was issued and the parties have submitted the matter for decision following the filing of briefs, a transcript of the trial, and oral argument.

The court concludes that none of petitioners' contentions presents grounds for granting the writ. Each of these grounds will be examined in turn.

---

[1] (a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

The definitions of "obscene matter," "person," "distribute," "knowingly," and "exhibit" are contained in Penal Code § 311.

Petitioners first claim that no evidence was introduced to show scienter. Since prosecution of individuals for disseminating allegedly obscene materials carries with it the risk that legitimate first amendment activities might be restricted, the Supreme Court has consistently held that some element of scienter, that is, some awareness of the contents of the obscene material by the exhibitor, must be contained in the applicable criminal statute and must be shown by the state. *Mishkin* v. *New York,* 383 U.S. 505, 511 (1966).

The Supreme Court has never articulated any precise standards in this area; rather they have set out the objectives that the scienter requirement must promote, particularly the goal of relieving disseminators of written work of the burden of inspecting all the reading material offered to the public. *Smith* v. *California,* 361 U.S. 147, 153 (1959). In this respect, it appears that whatever level of scienter is required for distributors of written material, a lesser level could be constitutionally permissible for motion picture theatre owners who can familiarize themselves with their limited materials much more readily. The risk of self-censorship is considerably less. *See generally, Smith* v. *United States, supra,* 361 U.S. at 152-55.

Under these standards, the California statute's requirement that to be guilty of a misdemeanor a theatre operator must "knowingly" exhibit the picture to others, where "knowingly" is defined as "being aware of the character of the matter" [Cal. Penal Code § 311], is constitutionally adequate. *People* v. *Pinkus,* 256 Cal. App. 2d Supp. 941, 948-49 (App. Dep't Super. Ct. 1967).[2]

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[2] The California obscenity statute as a whole was approved in *Alberts* v. *California,* 354 U.S. 476 (1957), companion case to *Roth* v. *United States.* The most-recent Supreme Court decision, *Miller* v. *California,* 413 U.S. 15 (1973), involving the California statute indicates that, if anything, California need not adopt as liberal an obscenity standard as it has.

The specific constitutional requirement of scienter in obscenity prosecutions also requires sufficient *proof* of knowledge under the applicable state statute. *Mishkin* v. *New York, supra,* 383 U.S. at 511. Once again, there is little specific Supreme Court guidance on the form or amount of proof. Speaking of booksellers, the *Smith* court indicated that:

> Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

361 U.S. at 154. *See also Mishkin* v. *New York, supra* at 511-12. Similarly, the state need not prove that a motion picture theatre owner has actually viewed the motion picture to support a conviction.

The evidence of scienter introduced in the state criminal prosecution of the Mitchells included the stipulation by petitioners that they owned and operated the O'Farrell Theatre where the motion picture film was shown; that they were aware the film was being shown at their theatre, and that they turned the film in question over to the police personally in response to a court order (R.T. 339). Additionally, petitioners introduced photographs of the theatre's exterior (R.T. 323) showing a sign that read:

> The material which is being exhibited at this theatre deals frankly and explicitly with sexual matters. If you would be offended, please do not patronize this theatre. Thank you.
>
> THE MANAGEMENT
>
> No one under 21 admitted.

Petitioners correctly point out that evidence of theatre ownership alone is an insufficient showing that the owners knew the character of the content of a particular picture shown there. *People* v. *Andrews,* 23 Cal. App. 3d Supp. 1, 8 (App. Dep't. Super. Ct. 1972). However, when there is proof, as here, that the petitioners were active participating owners and the material on the premises was identified as dealing explicitly with sexual matters, this has been held sufficient to sustain a conviction for distributing obscene material. *People* v. *Adler,* 25 Cal. App. 3d Supp. 24, 37 (App. Dep't Super. Ct. 1972):

> The circumstances shown by the evidence in this case, that the appellants were owner-proprietors and not absentee owners, whose stores were clearly denominated and advertised as "adult" book stores, and who admitted that they dealt in adult books concerned primarily or exclusively with sex, is sufficient to sustain the conviction.

See also People v. *Sarnblad,* 26 Cal. App. 3d 801 (2d Dist. 1972); *People* v. *Pinkus,* 256 Cal. App. 2d Supp. 941 (App. Dep't Super. Ct. 1967).

These allegations are constitutionally ample evidence that petitioners were aware of the contents of the motion picture "Glowy Flesh." As Justice Frankfurter pointed out in *Smith* v. *California:*

> [T]he proof of scienter that is required to make prosecutions for obscenity constitutional cannot be of a nature to nullify for all practical purposes the power of the State to deal with obsencity.

361 U.S. at 164 (concurring opinion).

Petitioners next raise three contentions that relate to the sufficiency of the evidence to show the elements of obscenity

required under the California statute.[3] The film itself was shown to the jury (R.T. 267). Thus petitioners are contending that the motion picture film by itself is insufficient evidence for the jury to find: (1) predominant appeal to prurient interest; (2) utter absence of redeeming social importance; and (3) that the film substantially exceeded customary statewide limits of candor.

Initially, it is clear that California law does not require the introduction of expert testimony on any of these issues. Cal. Penal Code § 312.1. This section effectively reversed *In re Giannini*, 69 Cal. 2d 563, 574 (1968), cited by petitioners. *See People* v. *Enskat*, 33 Cal. App. 3d 900, 913-14 (2d Dist. 1973). Thus petitioners' claim is that the film itself is constitutionally insufficient evidence on these elements. In *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973), this question was decided against petitioners. The Court held that it was not error:

> to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. The films, obviously, are the best evidence of what they represent.

Id. at 56 (citations omitted).

In their reply memorandum, petitioners deny that *Paris Adult Theatre I* is applicable here. They first attempt to distinguish *Paris Adult Theatre* as a civil case and thus an inappropriate standard for criminal cases such as this

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[3] California Penal Code § 311 provides in part:

> (a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurieint interest, i.e., a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

In subsection (b) "matter" is defined to include motion pictures.

one. However, the holding in *Paris Adult Theatre* on the need for expert testimony is not predicated in any way on the civil character of the proceeding there. In an earlier part of the opinion, the Court says:

> While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material, the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.

Id. at 54.

Finally, in holding that expert testimony was not required on the elements of obscenity, the Court cited *Ginzberg* v. *United States*, 383 U.S. 463, 465 (1966), which was a criminal prosecution. See 413 U.S. at 56. Thus there is no support for petitioners' suggestion that different evidentiary standards apply to civil and criminal obscenity proceedings.

Petitioners also argue that the evidentiary questions decided in *Paris Adult Theatre* are predicated on the new obscenity standards announced in *Miller* v. *California*, 413 U.S. 15 (1973), and that a violation of California law with its more liberal standards still cannot be shown without expert testimony at least on the issue of redeeming social importance. It is true that *Miller* permits states to adopt more liberal standards and that California has such a standard in section 311. 413 U.S. at 36-37. But petitioners' argument is beside the point. Even if the film itself is insufficient testimony under state law,[4] no constitutional

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[4] When the Supreme Court cited *Ginzberg* v. *United States*, 383 U.S. 463, 465 (1966), in support of its holding that expert testimony is not required when the allegedly obscene materials themselves are placed in evidence, it necessarily indicated that its view was equally applicable to the previous standard of obscenity announced in *Roth* v. *United States*, 354 U.S. 476 (1957), and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966), from which California's current statute is derived. *See People* v. *Enskat*, 33 Cal. App. 3d 900, 908-09 (2d Dist. 1973).

violation, necessary for relief here, is shown unless the evidence is so deficient as to amount to a denial of due process.

Adequate treatment of petitioners' claim, however, requires some examination of the effect of *Miller* v. *California,* 413 U.S. 15 (1973), on California law. A full analysis was undertaken recently by the California Court of Appeal in *People* v. *Enskat,* 33 Cal. App. 3d 900 (2d Dist. 1973), and this court is in agreement with the conclusions reached there, which it now reviews. Although the California judgment upholding appellant's conviction of distributing obscene matter in violation of Penal Code § 311.2 was vacated in *Miller,* it did not declare section 311.2 unconstitutional. 413 U.S. at 24 n.6. *Miller* took some efforts to set out new constitutional limits for the formulation of state statutory standards:

> State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 23-24 (citations and footnote omitted).

The first guideline is virtually identical to the language of Penal Code § 311. California courts have previously limited the second element of section 311 to specifically defined sexual conduct, thus meeting *Miller's* second requirement. *See People* v. *Enskat, supra* at 908-09, and cases cited therein.

The Court did reject as a *constitutional* standard the "utterly without redeeming social value" test of *Memoirs* v. *Massachusetts,* 383 U.S. 413, 419 (1966), and stated in a footnote: "We also reject, as a constitutional standard, the ambiguous concept of 'social importance.'" 413 U.S. 24-25 & n.7. However, the Court never indicates this would be impermissible when incorporated within an otherwise adequate state statute such as sections 311 and 311.2.

It is obvious from the opinion as a whole, and particularly this quotation near the end of the opinion, "we . . . hold that such material can be regulated by the States . . . without a showing that the material is '*utterly* without redeeming social value,'" [413 U.S. at 36-37] that in rejecting this as a constitutional standard, the Court was relaxing the constitutional limits on obscenity prosecutions. Thus California could adopt legislation with a less stringent proof burden on the state, but the current standards are not unconstitutional. *See People* v. *Enskat, supra* at 912.

In a companion case also involving section 311.2, the Court considered the evidence necessary for a showing on California's standard that the material in question was "utterly without redeeming social importance." *Kaplan* v. *California,* 413 U.S. 115 (1973). No expert testimony was offered on the issue, although the book in question had been introduced as evidence. The Court explicitly held, "On the record in this case, the prosecution's evidence was sufficient as a matter of federal constitutional law, to support petitioner's conviction," noting that, "We also reject in *Paris Adult Theatre I* v. *Slaton,* . . . any constitutional

need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence." 413 U.S. at 122, 121. Exactly the same evidentiary question was raised by petitioners here. The film was introduced into evidence and shown to the jury; Sergeant Sol Weiner of the San Francisco Police Department testified as to the elements of predominant appeal to the prurient interest and content substantially exceeding customary statewide limits of candor. Such evidence is constitutionally sufficient proof for all three elements—the only relevant inquiry in this proceeding.

As a corollary to these arguments, petitioners urge that Sergeant Sol Weiner was improperly qualified as an expert and his testimony on contemporary community standards should not have been admitted. These issues are matters of state law and do not rise to constitutional dimensions justifying habeas corpus relief unless the admission of this evidence was so prejudicial that it violates fundamental due process and the right to a fair trial. *Cassasa* v. *Nelson*, 452 F.2d 1083, 1085 (9th Cir. 1971).

As determined above, this evidence was unnecessary to obtain a constitutionally sufficient conviction, and the Supreme Court has been critical of the use of "expert" testimony in these cases. *See Paris Adult Theatre I, supra,* 413 U.S. at 56 n.6. However, the Court has never indicated that its use could amount to a denial of due process. In the trial here, the jury had the best evidence of the film's alleged obscenity available to it—the film itself. Sergeant Weiner testified for the state, and gave his opinion that the film "Glowy Flesh" exceeded the contemporary community standard limits of candor in sexual matters.

Petitioners' attorney was allowed a thorough voir dire of the witness' qualifications as an expert in the area and the basis for his opinion. During this examination, petitioners' attorney was able to get the witness to admit that in his opinion, the customary limits of candor regarding the sexual activities shown in the film have remained essentially the same since 1928 (R.T. 280-82). The jury thus had a full opportunity to judge the witness' qualifications and determine what weight should be given to his opinion. Additionally, two "experts" were called by petitioners as defense witnesses and testified on all three elements of obscenity in direct contradiction of Sergeant Weiner, and the jury was given thorough instructions regarding expert testimony (R.T. 522). Therefore, even assuming that Sergeant Weiner's testimony should not have been admitted, the court finds there was no prejudice to petitioners that constitutes a constitutional violation.

The trial judge gave the following general instruction to the jury regarding the legal definition of obscenity over petitioners' objection:

> You are instructed that movies showing recurring erotic acts of masturbation, sexual intercourse, lesbian activity, oral copulation and rectal activity without any relation to a wholesome dominant theme, which appeals as a whole to the prurient interest which taken as a whole goes substantially beyond the customary limits of candor and which is utterly without redeeming social importance are obscene motion pictures under the law of this state.

(R.T. 525). Petitioners claim that the giving of this instruction was error and amounted to a denial of due process in that it shifted the burden of proof to the defense to show a relation to a "wholesome dominant theme," and that it is a misstatement of the law.

This instruction was given along with instructions indicating that the three elements that constitute the last half of the disputed instruction must be found to exist (R.T. 524, 528). Thus, taken in its context, the challenged in-

struction does not shift the burden of proof to petitioners. Even by its terms, the instruction requires proof of the three elements, and then the acts specified must be unrelated to a wholesome dominant theme. Rather than placing an additional burden on the defense, this instruction gives them an additional element which can rehabilitate an otherwise obscene film.

Any burden on the defense due to the challenged instruction is lessened by the consideration that on this element, as on all evidentiary aspects of what is obscene, "The films, obviously, are the best evidence of what they represent." *Paris Adult Theatre I* v. *Slaton, supra,* 413 U.S. at 56. This specific identification of what portrayal of sexual conduct falls under the statutory prohibition easily meets the new federal constitutional standards. *Miller* v. *California, supra,* 413 U.S. at 23-27; *cf. Kaplan* v. *California, supra.* Since the challenged instruction is constitutionally sufficient under the first amendment, petitioners must show that its use rendered the trial fundamentally unfair. *Higgins* v. *Wainwright,* 424 F.2d 177 (5th Cir.), *cert. denied,* 400 U.S. 905 (1970). Nothing approaching this degree of unfairness has been shown in the circumstances here.

Petitioners' contention that Penal Code § 311.2 is unconstitutionally vague and overbroad has already been dealt with above. This was the view advocated by Justices Brennan, Stewart, and Marshall in *Miller* v. *California, supra,* 413 U.S. at 47-48 (dissenting opinion), and *Kaplan* v. *California, supra.*

Finally, petitioners argue that their presentation of "Glowy Flesh" is protected since it was seen only by willing adults. This position was flatly rejected in *Paris Adult Theatre I* v. *Slaton, supra:*

> We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only.

413 U.S. at 57.

IT IS THEREFORE ORDERED that the petition for writ of habeas corpus is denied.

Dated: January 8, 1974.

/s/ ILLEGIBLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-1680

JAMES MITCHELL and ARTIE MITCHELL, *Petitioners-Appellants,*

v.

RICHARD D. HONGISTO, Sheriff, City and County of San Francisco, *Respondent-Appellee.*
PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Order Affirming

[Filed Aug. 21, 1975]

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before: KOELSCH and HUFSTEDLER, *Circuit Judges,* and SMITH,* *District Judge.*

THE JUDGMENT IS AFFIRMED. *Hicks* v. *Miranda,* — U.S. — (No. 74-156, June 24, 1975).

MANDATE FORTHWITH.

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* The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.